SERVED: April 13, 1994

NTSB Order No. EA-4127

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. STEPHEN ALBERT NAYPAVER, JR., Respondent.	Docket SE-12367

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William E. Mullins, issued on August 14, 1992, following an evidentiary hearing.[1] The law judge affirmed part of an order of the Administrator, finding that respondent violated 14 C.F.R. 91.7(b) and 91.13(a). He dismissed the Administrator's claim that

[1]The initial decision, an excerpt from the hearing transcript, is attached.

respondent had also violated 14 C.F.R. 91.7(a).[2] The law judge reduced the Administrator's proposed suspension of respondent's airline transport pilot (ATP) certificate from 180 to 120 days. On appeal, respondent claims that the Administrator's order must be dismissed for reasons of res judicata, and further contends that he was prejudiced by the law judge's alleged failure to enforce his pretrial order. The Administrator argues that the § 91.7(a) charge should be affirmed, as well as a 180-day suspension. We deny respondent's appeal and grant that of the Administrator.

On May 19, 1991, respondent was operating N5788X, a Cessna 320. On departure from the DeKalb-Peachtree Airport, Atlanta, the aircraft lost power from its right engine. The aircraft struck some type of power line, sustaining damage that, all agree, made the aircraft unairworthy.[3] Respondent regained power

---

[2]§ 91.7, Civil aircraft airworthiness, reads:

> (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

§ 91.13(a) provides:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]The record does not definitively establish exactly what type of line was involved, other than it was 1-2 inches wide and had some amount of power running through it. The only eyewitness testified to a huge explosion, a flash of light, and a secondary explosion under the aircraft. Tr. at 36.

in the engine and continued his flight to Houston. Local control at Peachtree invited respondent to return and land, an invitation respondent declined. Exhibit A-2(a). ATC in Atlanta later passed a message to respondent that his landing gear had clipped power lines. Exhibit A-2(b). In his defense, respondent testified that he did not know that he had hit the power line, that ATC had only advised him that he may have hit the lines, and that the aircraft performed normally at all times. Respondent noted that he had been able to raise his landing gear without any problems.

The law judge found credible respondent's explanation that he was not aware that he had struck the power line.[4] The law judge concluded, however, that respondent's failure to check further after the engine failure, given his admission that he did not know its cause, by itself established the § 91.7(b) violation and a § 91.13(a) carelessness violation. The law judge dismissed the § 91.7(a) claim after concluding, among other things, that it was redundant of the § 91.7(b) charge and that respondent could not be convicted on both counts. Tr. at 277-278. We address

[4]We need not reach this issue because there are other bases on which to grant the Administrator's appeal, but respondent's testimony seems incredible to us, especially in light of the expert testimony on this point that the event could not have gone unnoticed in the cockpit (see Tr. at 107, 110-111, 146), the testimony of the eyewitness that she heard a huge explosion and saw lightning-like light (Tr. at 36), and inconsistencies in respondent's other testimony (compare Tr. at 170 (respondent testified that he had not been found guilty of violating a regulation in the past 5 years) and Tr. at 213 (respondent admits initial decision finding regulatory violation, Administrator v. Naypaver, NTSB Order EA-3199 (1990), and Board denial of his appeal in February 1991, NTSB Order EA-3250)).

respondent's appeal first.[5]

1. **Is the Administrator's proposed suspension of respondent's ATP barred by the doctrine of res judicata?**

To answer this question, we must review another proceeding, Administrator v. Naypaver, Docket SE-11906 (hereafter termed the prior proceeding).

On May 31, 1991, the Administrator issued an emergency order of revocation against respondent. That order (Exhibit A-20 in this proceeding) alleged that respondent had operated the May 19, 1991 flight while his certificate was under suspension.[6] As a result, respondent was alleged to have violated § 61.3(a) and 91.13(a). The initial decision of the law judge (Exhibit R-3 in this proceeding) upheld the violation, rejecting respondent's defense that he had served his 105-day suspension and did not have to surrender his certificate to do so. We reversed, on appeal, for reasons not pertinent to the issues before us here. The only issues in the prior proceeding related to whether respondent's certificate was under suspension at the time he flew the aircraft, and possible mitigating circumstances (referred to

[5]Respondent has not directly challenged the law judge's reasoning for upholding the § 91.7(b) and § 91.13(a) charges, and we do not necessarily agree that an engine failure, in and of itself, should always cause pilots to land the aircraft for inspection. Nevertheless, the circumstances here, as discussed infra in connection with § 91.7(b), support the violation findings.

[6]The suspension was the result of the Board's February 1991 action. See footnote 4.

but not described by the law judge).[7]

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. For the doctrine to be applicable, however, there must be identity of the parties and of the cause of action. Although the courts are not unanimous in their definitions of "cause of action,"[8] a review of the purpose of the res judicata doctrine in the context of public safety enforcement cases brought by the Administrator convinces us to find no identity in the cause of action in the two cases involved here. According to the evidence before us (and respondent has the burden of proof as res judicata is an affirmative defense), the prior proceeding dealt only with whether respondent had piloted the aircraft on that day and whether his certificate was under suspension at the time. Airworthiness claims were not raised in the complaint. There is absolutely no evidence that any details of the flight -- events critical to a decision here -- were even mentioned in that hearing; they were not pleaded (or necessary to the allegations) in the Administrator's complaint there, nor were they mentioned in the initial decision. The present case, thus, does not stem

[7]The law judge dismissed the Administrator's added claim of a § 91.13(a) violation, having found that no evidence was presented on that point. R-3 at 152. Thus, there is no indication that this charge represented anything more than a derivative allegation stemming from the charge of operating an aircraft while respondent's certificate was suspended.

[8]See May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1009-1010 (10th Cir. 1990).

from the same nucleus of fact and does not, in our view, invoke the principles behind res judicata.[9]

Thus, as we held in Administrator v. Swanson, NTSB Order EA-3500 (1992) at 7, the Administrator's claims are different, the facts necessary to establish the claims are different, and the doctrine of res judicata will not be applied.[10] And, in further answer to respondent's concern that he may be tried again and again based on the same events, we note the protection precedent, including our stale complaint rule, offers. See 49 C.F.R. 821.33 and Administrator v. Wells, NTSB Order EA-3424 (1991) (stale complaint rule inapplicable, but complaint still subject to attack if actual prejudice occurred due to Administrator's delay). Respondent is incorrect in alleging that all the Administrator must do to circumvent the stale complaint rule is to allege lack of qualification. To the contrary, that allegation may not be a subterfuge to avoid dismissal.[11]

This result also comports with practical and policy considerations. Although the Administrator was aware of all the

---

[9]"By preventing repetitious litigation, application of res judicata avoids unnecessary expense and vexation for parties, conserves judicial resources, and encourages reliance on judicial action." May, supra at 1009, citation omitted.

[10]In Swanson, we found reason, nevertheless, to reduce the sanction in light of the close relationship between the issues in the two proceedings. Here, we find no such similarity, nor does respondent argue mitigation based on that case.

[11]Respondent is also incorrect in arguing that the stale complaint rule does not apply in the event the Administrator seeks a civil penalty. Our interim rules (see 58 FR 11379-80) provide to the contrary.

facts when he brought the order in the prior proceeding, it may be that his desire to revoke respondent's certificate on an emergency basis led (not unreasonably, we think) to the filing of a complaint based on limited charges that could be, he thought, easily and quickly developed and proven.

2. **Did the law judge commit prejudicial error? "Did the issuance of a Pretrial Order by the ALJ defeat the purpose of achieving uniformity and consistency in agency proceedings mandated by the passage of § 821 of the Rules, and prejudice Mr. Naypaver when not enforced?"**

A number of times during the hearing respondent objected to evidence introduced by the Administrator on the ground that this material had not been produced earlier, as required by the law judge's pretrial order. The law judge overruled all the objections. We find no abuse of the law judge's discretion and no prejudice to respondent from the law judge's actions.

The pretrial order is a form issued by law judge Mullins in cases assigned to him, and is within his discretion.[12] The law judge's comments regarding the order indicate that it is intended to promote communication and adequate preparation (Tr. at 67), and, by its own terms, contains no specific sanction.

The first category of error respondent cites involves the

[12]We see no basis to respondent's argument that the law judge has no such authority. Respondent cites, and we see, nothing in our rules of practice to preclude the practice. Rule 821.35 is broad enough to countenance pretrial orders designed to improve and expedite the hearing process.

Administrator's offering, mostly prior to the taking of testimony, copies of various relevant Board decisions and a pertinent FAA Advisory Circular. The law judge found that presentation of the cases did not violate his order (Tr. at 28), and we have no basis to disagree. As to these materials and the Advisory Circular, we agree with the Administrator that this was not an abuse of discretion. We do not see how respondent could be prejudiced by references to precedent with which he should be familiar, and that the Administrator was providing for the convenience of the law judge. Moreover, the Advisory Circular concerned the Administrator's Aviation Safety Reporting Program (ASRP), is also a matter with which respondent should be familiar as he filed an ASRP report, and for which he, not the Administrator, had the burden of proof.

Respondent's next objection concerns the scope of testimony of one of the eyewitnesses. We decline to find, as respondent would have us, that compliance with the law judge's order required a statement of every detail to which a witness would testify. Respondent had more than adequate notice, from the information supplied by the Administrator, as to the intended scope of this testimony.

The third area of objection concerns photos showing the damage to the aircraft. The Administrator had, early on, advised respondent of these photos and promised to supply them. According to the Administrator, the photos were lost for a considerable period, but copies were received by respondent 2

days before the hearing. Although the facsimiles were not clear copies, we see no prejudice to respondent. Relevant damage to the aircraft was listed in the complaint, and there is no indication that the aircraft itself was not available to respondent for his inspection. Furthermore, the law judge granted respondent the opportunity at the hearing to review the photos (Tr. at 67), after which he admitted their accuracy.

Finally, respondent objects to introduction of Exhibit A-20, the Administrator's emergency revocation order in the prior proceeding. This document, however, was introduced in response to respondent's res judicata claim and, therefore, could not reasonably be subject to a pretrial order. In any case, we see no prejudice, as respondent was well aware of it.[13] We reject respondent's appeal and turn to that of the Administrator.

3. **Was the law judge's analysis of § 91.7(a) error? Was that violation satisfactorily proven?**

The law judge found, as noted earlier, that § 91.7(a) was redundant of § 91.7(b) and that a finding that paragraph (a) was violated required a prior finding that the unairworthy condition was cognizable before takeoff. Tr. at 277. We disagree with both conclusions.

As the Administrator explains in his appeal (at 16-17), the law judge's construction of the two paragraphs as redundant does

[13]Respondent refers to an objection at page 6, line 17 of the transcript. We find no objection there. Further, the noted objection at page 218, line 17 was sustained, see page 219.

not comport with a reasonable reading of them. They serve two different purposes and, while clearly related to each other, are not the same. Holding that airworthiness is only a pilot's responsibility when the matter is cognizable before takeoff is illogical, as this case demonstrates. Otherwise, pilots would be permitted to continue to fly aircraft even if they knew an unsafe condition had arisen in flight. See Administrator v. Halbert, NTSB Order EA-3628 (1992).

In this case, we find that respondent violated paragraph (a) as well as (b). The tapes of the tower communications clearly show that respondent was advised that his landing gear had struck a power line. This knowledge should have led him to land and ensure that there had been no damage to the aircraft, even if he misheard ATC to say only that he may have hit a power line. When respondent was advised by ATC, how many times he was contacted, or whether he was told that the aircraft had hit a line or may have hit a line are not critical questions. Even in respondent's version of events, he was told of the possibility hundreds of miles from his destination. Tr. at 209. Given the circumstances, his continuing his flight as if it were routine does not satisfy the highest standard to which an ATP is held. See Administrator v. Campbell, NTSB Order EA-3573 (1992) (because respondent had sufficient reason to suspect his aircraft had struck a foreign object, his assumption that flight instruments would indicate any problem with the aircraft did not reflect an adequate standard of care). Similarly, respondent's assumption

that the aircraft was airworthy because the landing gear came up after he lost engine power was not a satisfactory discharge of his duty in the circumstances.

4. **Should the 180-day suspension be reinstated?**

The Administrator argues that this length suspension is justified by respondent's lack of compliance disposition, as demonstrated by our decision in Administrator v. Naypaver, supra, in which a 105-day suspension was imposed. Respondent offers no argument in favor of the law judge's sanction reduction nor does he present any other basis for mitigation. On review, we find that a 180-day sanction is within the appropriate range considering respondent's prior violation history.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted;

3. The initial decision is modified as set forth in this opinion; and

4. The 180-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[14]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[14]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).